Supreme Court of the United States

OCTOBER TERM, 1942.

No. 571.

In the Matter

of

SURF ADVERTISING CORPORATION,

Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of Surf Advertising Corporation,

Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

Respondents.

REPLY BRIEF BY PETITIONER.

DAVID HAAR,
Attorney for Petitioner.

THE COURT PRESS, N. Y. C.

INDEX.

TABLE OF CASES CITED:

OTHER AUTHORITIES CITED:

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 571.

In the Matter

of

SURF ADVERTISING CORPORATION,

Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of Surf Advertising Corporation,

Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

Respondents.

REPLY BRIEF BY PETITIONER.

(A) **As to Respondent Joseph S. Abrams.**

POINT I.

The case of *Quaker City Sheet Metal Company*, 129 Fed. (2d) 894, cited by respondent, is an additional reason for granting the petition.

The brief filed on behalf of Joseph S. Abrams, respondent, emphasizes our argument, in support of our petition, and furnishes additional reasons for granting it.

We respectfully call the Court's attention to the case of *In re Quaker City Sheet Metal Company,* 129 Fed. (2d) 894, C. C. A. (3d) 1942, cited on the first line of page 12 of respondent Abrams' brief. The summary statement on that page of what the case decided is incorrect. What that case really decided is exactly what we are arguing here, namely that Section 60 of the Bankruptcy Law, as amended by the Chandler Act on September 22nd, 1938, must be taken into consideration with respect to assignments of accounts receivables, when the controversy is between the assignee and the trustee in bankruptcy of the assignor.

We respectfully urge this Court to read that case. It is extremely helpful in support of our argument.

In that case Quaker City Sheet Metal Company was in financial difficulties and obtained several loans from the Corn Exchange National Bank between January and April of 1940. On April 12th, 1940, one Dearden also made a loan to the company. With each loan, and as collateral security for it, the company assigned contracts, and the accounts receivable arising from the contracts. These assignments were made in Pennsylvania, with the knowledge of a creditors' committee. Neither the bank nor Dearden gave any notice of the assignment to the parties who owed money on the future accounts receivables so assigned.

On April 18th, 1940, an involuntary petition in bankruptcy was filed against the company. At that time the company owed the bank about $7900 and Dearden $1550. The bank filed a proof of claim as a secured creditor, and the trustee in bankruptcy objected. Dearden filed a petition for reclamation. Both claims were allowed by the referee in bankruptcy as secured claims, and the District Court

affirmed the orders. The trustee in bankruptcy appealed to the Circuit Court.

We state the problem from the opinion of the Court:

> "The trustee concedes the indebtedness, but contends that the assignments are voidable preferences by virtue of subdivisions (a) and (b) of Section 60 of the Bankruptcy Act as amended, 11 U. S. C. A., Sect. 96, subs. (a), (b)."

The Court will observe right at the outset the similarity in the controversy between that case and our own. Likewise, the Court will observe that in that case, as well as in our own, the trustee challenged the validity of the assignments, on the ground that they were preferences under Section 60 (a) and (b).

It was the effect of the amendment to Section 60 that the case proceeded to discuss and decide. Without going into the very interesting discussion of Circuit Judge Maris in his opinion, it is sufficient to state that the Court did discuss Section 60 (a) and (b) in relation to the assignment, which, of course, was valid between the assignor and the assignee under the Pennsylvania law, but which was challenged as between the trustee in bankruptcy of the assignor and the claimant assignee. In its discussion, the Court considered the meaning of the word "transfer", and when it became effective. It said:

> "On the contrary, it is obvious that the time of the making of a transfer is the essential element in determining whether a debt on account of which it is made was antecedent to it."

The Court then proceeded with this conclusion, as follows:

> "We conclude that the rule laid down in the second sentence of subdivision (a) of section 60 for determining the time of the making of a transfer applies to the determination of the question whether the transfer was made for or on account of an antecedent debt. *In this conclusion we are supported by students of the act who have forcefully pointed out that the purpose of Section 60, sub. (a), as amended by the Chandler Act of 1938, was to strike down secret liens even though given for a present consideration.*"
>
> *Quaker City Sheet Metal Co.*, 129 Fed. (2d) 894 (C. C. A. 3 1942).

In a footnote the Court refers to Prof. McLaughlin's article on "Aspects of the Chandler Bill to Amend the Bankruptcy Act" (1937), 4 U. of Chicago L. Rev. 388; Mulder, "Ambiguities in the Chandler Act" (1940), 89 U. of Pa., L. Rev. 10, 25; 3 Collier on Bankruptcy, 14th Ed., Sec. 60.48.

The Court ultimately decided that in view of Section 60 of the Bankruptcy Act, a preference was created because all of the elements of a voidable preference were present. The order of the District Court was reversed.

There was a dissenting opinion by Circuit Judge Jones, in which he, too, discussed the purpose and intent of Section 60 of the Bankruptcy Act, as amended by the Chandler Act.

All of this bears out our contention, not that the decision was right or wrong, because that is not in issue on this petition, but that there is a question of

law for this Court to answer. This is particularly true in the light of the foregoing case referred to by our opponent, and in the light of the several cases referred to by us in our main brief, when we know that the decision of the Circuit Court of Appeals for the Second Circuit in reversing itself said, as clearly as anybody can say it, that they were not considering Section 60 (a) at all in making their determination, even though the trustee argued its applicability to the facts in the case.

We again respectfully ask the Court to read this case. It should be added to the other cases cited by us under Point III, page 32 of our main brief.

While the question of authorities is before us, may we respectfully point out that the other cases cited by Abrams' counsel on page 12, have nothing to do with the present issue. He refers to three cases, and asserts that "it was held that any contest between the holders of assignments and trustees in bankruptcy, the validity and effectiveness of the assignments are governed by the law of the state where they were made". We have examined the cases. We believe that counsel is quite mistaken in his statement of what they decide.

The case of *In re Imperial Brewing Co.*, 127 Fed. (2d) 766, 768, C. C. A. (3d), involves a conditional sales contract that was recorded. Therefore, there was no "secret lien" involved. The trustee has no title to the property covered by a conditional sale. There can be no claim of preference in such a case. The case is not in point.

The second case, to wit, *L. H. Duncan & Sons*, 127 Fed. (2d) 640, 641, 642, C. C. A. (3d), has nothing

to do with assignments. What it has to do with is the right to subrogation by a surety which had paid out money for laborers and materialmen after the contractor had defaulted in performance. The claim was against the state for moneys due for performance. The Court held the surety entitled to be subrogated under the circumstances involved in the case. Incidentally, a reading of that case will show that the Court followed the Federal law, because it so happens that the Federal law covering the rights of sureties to subrogation was the same as the law of Pennsylvania.

The third case, to wit, *Mutual Life Insurance Company* v. *Menin,* 115 Fed. (2d) 975, 977, is not a case in the Third Circuit, as cited, but is in the Second Circuit. Moreover, it has nothing whatever to do with assignments or with any claim of preference. It discussed the sale by a trustee in bankruptcy of the good will of a bankrupt, and what such a sale entails.

I have not examined the other cases cited by counsel for Abrams in his brief. They are practically a repetition of those referred to on the motion for reargument. If they are, they do not touch the point which we are urging, namely, the error by the Circuit Court in refusing to determine the issue in the light of Section 60 of the Bankruptcy Act, as amended, based on the facts of insolvency of the bankrupt and knowledge of insolvency on the part of Abrams at the time when he was attempting to enforce his claim under this alleged assignment.

It is therefore respectfully submitted that Abrams' argument is unavailing as a response to our peti-

tion based on the grounds of error urged in our first point (p. 15), to wit, that the Court below had not followed the ruling of this court, laid down in the case of *Prudence Realization Corp.* v. *Geist*, 62 S. Ct. 978, Advance Sheets of May 15, 1942, insofar as the Circuit Court declined to take into consideration the Bankruptcy Law, in a contest between a trustee in bankruptcy and assignees claiming under an assignment of moneys to be earned in the future under the contract, when the Court had a duty to decide the issue, not in the light of local law applicable between an assignor and the assignee, but in the light of the Bankruptcy Law applicable in a controversy between the trustee in bankruptcy and the assignee.

POINT II.

Respondent Abrams has not answered our argument under Point III, page 32.

We have urged under Point III that our petition is proper and the writ should be issued, because the Second Circuit has decided a question of Federal law, which is not, but should be settled by this Court. We have pointed out that in the case of *Matter of Talbot Canning Corp.*, D. C. Md., 35 Fed. Supp. 680, the District Judge did consider Section 60 of the Bankruptcy Act, when raised as against an assignee of future accounts, and so did the District Judge in case of *In re Seim Construction Co.*, 37 Fed. Supp. 855, and now, we have our opponent's citation of the case of *Quaker City Sheet Metal Company*, 129 Fed. (2d) 894, which also considered Section 60 of the Bankruptcy Act on similar facts.

The District Court case may not be considered as authoritative. The Circuit Court case has not the strength that a unanimous decision might have since there was a dissent. There is no other decision that we could find bearing on the question. The law is new. It is a drastic change over the old provisions applicable to preferences. It is the embodiment of what its draftsman thought was an effort to strike down "secret liens". Whether they succeed or not is a question that this Court should decide. We believe that our case affords an opportunity for an authoritative interpretation of the new provisions of Section 60 since its drastic amendment in 1939 and for that reason we respectfully urge that the petition be granted.

POINT III.

Respondent has not answered our contention that the decision in question conflicts with decisions of other circuit courts on the subject of equitable liens.

Point II of our main brief, page 25, has scarcely been answered. Yet it seems to us we have shown conclusively how conflicting are the opinions in other circuits with those of the Second Circuit in this case, even without the amendment of the Chandler Act. We call the Court's attention to the conflict indicated in the case of *Lone Star Cement Corp.* v. *Swarthout,* 93 Fed. (2d) 767, C. C. C. (4), on page 31 of our brief. The opinion cites and follows a decision of this Court as to what does and what does not constitute an equitable assignment, as distinguished from a promise to pay out of a fund to be created in the future (*Christmas* v. *Russell,* 14 Wall. 69, at 71).

The facts in the present case have not been quite accurately stated by our opponent in his brief, but we will make no further comment on that, because undoubtedly the Court already has the facts before it. The chief thing to consider is whether or not the Circuit Court, in changing its decision as it did, was, justified in doing so, in the light of the law as we have argued it. We believe that it did not, and we further believe that a consideration by this Court of the legal question involved not only is necessary, but imperative, in the light of the problem presented, and the importance of getting an early decisive opinion as to whether or not Section 60, as now drawn, is effective to strike down secret liens.

(B) **As to Respondent Mathilde Lehman.**

The respondent Lehman appears to rely upon Abrams' brief. To that extent, we believe we have discussed the points in the preceding argument, and nothing further need be added.

However, she raises the point again (which, of course, goes to the merits and not to the question as to whether the petition should be granted), that she got her assignment from Fiegel Advertising Company, and not from Surf. She cites *Salem Trust Company* v. *Manufacturers Finance Co.,* 264 U. S. 182, for the proposition that, having gotten the assignment, she could rest secure for the remainder of her life, and get her money, and interest from even a subsequent purchaser, or its trustee in bankruptcy.

The *Salem Trust Company* v. *Manufacturers Finance Co.* case does not decide that at all. We do

not argue that, as to Fiegel, Lehman obtained rights which might be paramount as against subsequent assignees, but they are not paramount as to subsequent purchasers for value without notice. Surf was a purchaser of the contract from Fiegel, without notice. Lehman notified Surf several months later of her claim, but that was too late. Lehman had no contract with Surf, and Surf was not obligated to work, and pay to Lehman, what Fiegel owed her.

At best, Lehman might consider herself in the light of a mortgagee with an unrecorded mortgage to personal property—to a machine let us say, which was bought by a person without notice of Lehman's unrecorded mortgage. If the purchaser uses the machine, and makes money out of it, that is no reason why the money that he makes out of it should be used to pay Fiegel's debt to Lehman. The debt still is Fiegel's, and not Surf's.

As we have shown, at best, Lehman may consider herself a creditor of Surf. If she does, she stands in no better position than Abrams, and probably, in a worse position. Be that as it may, it is now undisputed that Lehman knew, or had reasonable cause to know of the insolvency of Surf as of at least December 7, 1939. If that be so then she would be getting a preference under section 60. Hence the petition for certiorari is properly filed, even as against her, because the Court below refused to consider Section 60 of the Bankruptcy Act as applicable to the facts in her case too.

We believe that the reasons advanced by the respondents against granting the petition, are not persuasive. As the commentators on the law have told us, an attempt has been made for the last thirty-five years to break down the practice of secret liens.

Some Courts believe the effort has been successful. In the decision now sought to be reviewed, the Second Circuit seems to hold otherwise. This Court should therefore grant our petition, so that this important question may be passed upon, and conflict of decision eliminated.

Respectfully submitted,

DAVID HAAR,
Attorney for Petitioner.